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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1982

No. A-350

STATE OF MISSOURI

Respondent,

v.

PATRICK E. TRIMBLE,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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QUESTIONS PRESENTED

1. Whether or not a judgment of death is excessive and disproportionate and therefore violative of the Fifth, Eighth and Fourteenth Amendments where the jury's verdict specifically sets out as the aggravating circumstance, on which its assessments of a sentence of death is based, matters not pled, charged or proved by the state and outside of the aggravating circumstances contained in Missouri's Statutory requirments for imposition of the death penalty, Section 565.012.2 (1-10) RSMo. 1979?

2. Whether or not the judgment of death is excessive and disproportionate and therefore violative of the Fifth, Eighth, and Fourteenth Amendments when it is imposed soley as a result of finding of Defendant's status as a person lawfully confined and whether or not said aggravating circumstance is overbroad and overinclusive as to deprive Petitioner herein of Due Process of Law under the Fifth and Fourteenth Amendments?

3. Whether or not the introduction into evidence by the State of Defendant's charges on which he was held at the time of the alleged crime, and which are unconnected to said crime, at trial and at the penalty phase of his trial, violates his right not to incriminate himself and his right to Due Process of Law guaranteed by the Fifth and Fourteenth Amendments when the aggravating circumstance charged by the state and submitted to the jury does not require jury to find, determine or consider whether Defendant has been convicted of or is guilty of any specific other crimes?

4. Whether or not the Notice of Aggravation provided Defendant by the State prior to trial denied him Due Process of Law guaranteed by the Fifth and Fourteenth Amendments when said Notice merely set forth the aggravating circumstance in statutory language and provides no evidence to be relied on by the State, or names and addresses of witnesses who would prove same;

and whether said Notice, provided a mere thirty prior to trial, deprived counsel of sufficient particulars and or time to enable him to prepare a defense in the penalty phase?

5. Whether or not the judgment of death is excessive and disproportionate and therefore violative of the Fifth, Eighth and Fourteenth Amendments where the prosecutor was allowed to state to the jury the range of punishment contrary to Section 565.006 RSMo., 1978, which states that the jury should consider the guilt or innocence of a Defendant charged with Capital Murder without having any consideration of the range of punishment in that phase of the trial?

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PETITION FOR CERTIORARI

Petitioner, Patrick E. Trimble, respectfully requests that a Writ of Certiorari issue to review the judgment of the Supreme Court of Missouri, affirming his conviction of the crime of Capital Murder in Missouri Court and the resultant sentence of death.

OPINION BELOW

The opinion of the Supreme Court of Missouri is styled and numbered as follows:

State of Missouri, Respondent, V. Patrick E. Trimble, Appellant, No. 62523, _____ S.W. 2D _____, (Mo. Banc 1982). A copy of the opinion is reprinted as Petitioner's Appendix A.

JURISDICTIONAL STATMENT

The opinion of the Supreme Court of Missouri in State of Missouri v. Patrick E. Trimble, No. 62523, was filed August 31, 1982. The opinion affirmed Petitioner's state conviction of Capital Murder. On October 7, 1982, the Missouri Supreme Court overruled Petitioner's Motion for Re-Hearing. The order overruling the Motion is included in Appendix A directly after the opinion below this cause.

The present Petition is filed within sixty days after the entry of the above final judgment of the highest Court in Missouri in the above case, and this Court's jurisdiction is invoked under 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or the militia, when in active service in the time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation.

United States Constitution, Sixth Amendment reads as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Eighth Amendment reads as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

United States Constitution, Fourteenth Amendment reads as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or poverty, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sections 565.001, RSMo 1977; 565.006, RSMo 1977; 565.008, RSMo 1977; 565.012, RSMo 1977; 565.014, RSMo 1977; and 565.016, RSMo 1977, are set forth in Appendix B.

STATEMENT OF THE CASE

Petitioner, Patrick E. Trimble was convicted in the Circuit Court of Cass County, Missouri of the crime Capital Murder, under Sections 565.001, and 565.006 RSMo. The jury assessed his punishment at death and the trial judge imposed the death penalty as his sentence pursuant to the jury's verdict.

Petitioner was charged by the State in the death of a fellow inmate which occured November 12, 1979 in the St. Charles County, Missouri jail. Both Petitioner and the deceased were in jail awaiting trial on other charges.

The Missouri Capital Murder statutes require that in charges of Capital Murder there be a bifurcated trial in which the jury during its first deliberation decides only the question of guilt or innocense without any consideration of punishment. 565.012 RSMo.

Thereafter, there is a second phase in which both the State and Defendant present evidence in aggravation or mitigation of the crime. The jury is required to find beyond a resonable doubt one of a number of aggravating circumstances before it is authorized to impose a sentence of death.

The aggravating circumstances prosecution can request the jury be instructed to consider are specifically set out in the statutes 565.012 (2) RSMo.

Under the Missouri Rules, the State was required to inform the Defense by a Notice of Aggravation of any aggravating circumstances it proposed to submit to the jury. In this case, a Notice of Aggravation was presented to the Defense thirty days prior to trial, and said Notice set out in statutory language the circumstances which it would propose be presented to the jury for their consideration. No Notice of any evidence which the State would offer to support the submission of the aggravating circumstances or witnesses it expected to call in the penalty phase were identified in the Notice.

During the trial of Petitioner below the State attempted to prove two theories as to his motive for the murder. The State produced as witnesses other inmates who testified that Petitioner stated that he intended to commit a murder while in jail to avoid going to the penintentiary with a conviction for the rape of a child, the charge on which he was held at the time of the murder of which he was charged herein.

The states second theory was that Peitioner committed the murder to cover up other crimes committed against the victim, namely that he had been brutalized by Petitioner while both were inmates at the jail.

Over defense objections raised at trial, in the Motion for New Trial, and in the Appellate Court, the prosecution was allowed to present evidence of the charges on which Petitioner was held. Defense objections were based on the fact that while possibly relevant to motive such evidence was unduly prejudicial and the State had sufficient means by which to prove its case in the absence thereof.

During its closing arguments the attorney for the State, in addition to continuing to argue the other crimes on which Petitioner was held, stated to the jury the full range of punishment allowed for a verdict of Capital Murder. The prosecutor stated that the only punishments authorized for Capital Murder are death or 50 years imprisonment without probation or parole, and stated the possible ranges of punishment for the lesser included offenses on which the jury was instructed. The Missouri Capital Murder statute provides that in the first phase of a Capital Murder trial,"the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment....." Objection to the argument was timely raised by Petitioner in hi Motion for a New Trial, considered and rejected by the Missouri Supreme Court.

The jury was instructed on two aggravating circumstances in the penalty phase of the Petitioner's trial, namely: (1) that the death of Jerry Everett was caused by Petitioner for the purpose of avoiding lawful arrest or prosecution on any additional charges; and (2) that he was in the lawful custody of a place of confinement. The jury, following its deliberations returned their verdict assessing the punishment at death in the following form:

> "We, the jury, having found the defendant Patrick E. Trimble guilty of the capital mur- of Jerry James Everett, fix the Defendandt's punishment at death, and we designate the following aggravating circumstances which we find beyond a reasonable doubt: That at the time of the murder of Jerry James Everett the defendant was in the lawful custody of a place of confinement and as a deterrent to future acts of violents"(sic).

The jury rejected the first aggravating circumstance on which it was instructed and combined with the second a rational of its own not authorized by the Missouri Statute.

THE REASONS FOR GRANTING THE WRIT

Petitioner submits that a Writ of Certiorari should issue to the Supreme Court of Missouri because the Missouri Supreme Court's holding below that a sentence of death can be imposed when a jury has specifically grounded its assessment of the sentence of death on a non statutory aggravating circumstance, conflicts with the Petitoner's rights to Due Process and Equal Protection of the law under the Fifth and Fourteenth Amendments to the Constitution and subjects him to an arbitrary and capricious sentence of death constituting cruel and unusual punisnment under the Eighth Amendment.

It is submitted that to allow a jury to combine an aggravating circumstance set out in a sentencing statute with an additional aggravating circumstance of its own devise, which has not been authorized by the legislatute, denies a defendant's right under the Fifth and Fourteenth Amendment to Due Process of Law in subjecting him to a sentence which is arbitrary and capricious, and as such violative of the Eighth Amendment's prohibition against cruel and unusual punishments.

This Case is a perfect companion to that of Barclay v. Florida, U.S.S.C. No. 81-6909 in which this Court on November 8, 1982 granted Certiorari.

In Barclay v. State of Florida, supra, a state prisoner is challenging his sentence of death imposed by a judge after the jury recommended a sentence of life imprisonment. The State Court judge in Barclay based the death penalty on both non statutory aggravating circumstances which were set forth in a presentence investigation and the fact that a co-defendant whose involvement in the crime was not greater that Barclay had been given a sentence of death. The question set forth in Barclay's Petition which is now before the Court is; if a judge or jury considering whether to impose a sentence of death or life impri-

sonment takes non-statutory aggravating circumstances in account, must the resultant death sentence be invalidated?

This case is close enough to Barclay that the result therein may well be determinative. It does, however, present enough differences that the Court should consider it as well.

In this case as opposed to Barclay, it was the jury and not the judge who specified in its verdict form, and contrary to the Missouri Law as instructed by the trial judge, that it was basing the sentence of death on the non-aggravating circumstance "to deter future act of violents".(SIC). That factor was added by the jury in its verdict form to the statutory aggravating circumstance that the homicide took place while Petitioner was in a place of confinement.

In this case it is highly possible that the jury not only found a non-aggravating circumstance, but imposed a sentence of death based on a factor having nothing to do with the particular defendant. We do not know whether the jury meant that it wished to deter anyone who might be inclined to commit a homicide in the future, or, whether it was referring to this particular defendant and imposing the death penalty to prevent him from committing a future violent crime. Neither of those factors is an aggravating circumstance with authorizes the imposition of the death penalty under the Missouri Statute. 565.012 RSMo. In the light of their statement on the verdict, we cannot be certain that a jury would have found the circumstances such as to justify the death penalty due to the homicide having taken place in a place of confinement alone. We will never know the amount of influence the unauthorized factor had in their assessment of punishment.

Following the finding by this Court that the death penalty in numerous States and had been imposed in an arbitrary and capricious manner in Furman V. Georgia, 408. U.S. 238.(1972), the numerous states enacted death penalty statutes in which the penalty of death was not authorized in every homicide, but limited to a narrow number of circumstances in which the homicide

was committed in such a manner as to constitute an aggravating circumstance.

In later cases, this Court has required that the aggravating circumstance be found by the jury beyond a reasonable doubt prior to the imposition of the sentence of death. Gregg v. Georgia, 428 U.S. 153 (1976).

In Godfrey v. Georgia, 446 U.S. 420, (1980), this Court held that the application of an aggravating circumstance must be quite narrow to justify the death penalty. In the Godfrey case the question was whether the homicide "was outrageously of wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind. or an aggravated battery to the victim." Ga. Code Section 27-2534.1(b) (7) (1978). This Court held that even though the jury found the aggravating circumstance beyond a reasonable doubt, the judgment of death could not be affirmed until it had independently assessed the evidence of record and determined upon such evidence that it supported the trial judge's or jury's finding of an aggravating circumstance. Although, Godfrey had stalked and murdered his wife and mother-in-law, it was held that the facts did not comprise the aggravating circumstance as it must be so narrowly construed as to only include those crimes where the victim had been tortured or subjected to an aggravated battery prior to death.

In this case we have a situation in which the jury, to an even larger estent than in Godfrey, roamed beyond the aggravating circumstance authorized by the statute. The jury herein specifically stated in its verdict that an additional factor, not authorized by statute was determinative.

The Missouri Supreme Court in its opinion upholding Petitioner's conviction held that the statutory aggravating circumstance is "only a threshold requirement that must be met before the jury can, after considering all the evidence, recommend the death sentence." State of Missouri v. Patrick E. Trimble,

No. 62523, August 31, 1982. To hold as the Missouri Court that the aggravating circumstance is only a threshold would allow the jury, once it is found, to impose a sentence of death based on race, poverty, political unpopularity or any number of clearly impermissable, arbitrary and capricious factors having nothing to do with the particular offender or crime involved, and would be a giant step backwards to the pre Furman days.

As stated by this Court in Godfrey, a sentence of death in only properly imposed in strict compliance with the statute. Where the statute is not strictly complied with, the sentence is invalid and must be overturned. It is clear from this Court's grant of certiorari in Barclay, supra, that it is concerned with the extent to which a sentencing judge or jury can roam beyond the aggravating factors set out in the statute. Clearly this is a case in which the states are in need of and could benefit from this Court's guidance to clarify a situation that is not an isolated problem. The instant case presents an opportunity for the role of extraneous, non-statutory factors in capital sentencing to be clearly defined and limited, so that defendants in capital cases are treated evenhandedly.

There are additional questions which merit the Court's grant of certiorari herein. It is submitted that in cases such as this the death penalty violates the Eighth Amendment where it is imposed based solely on a person's status as an inmate.

The jury below rejected the other statutory aggravating circumstance and combined an additional factor of deterence in its verdict. The aggravating circumstance upon which the sentence below was based would not justify the death penalty under the facts of this case.

Ostensibly, the aggravating circumstance of a homicide committed while in lawful confinement was to prevent

the death or injury of guards who might be attacked in an inmate's attempted escape, or to prevent a crime by an inmate already under a life or lengthy sentence.

Neither of those factors was present below, but rather, Petitioner and his alleged victim were both in a county jail awaiting trial on unrelated charges. Neither was under a sentence of any kind at the time.

There was no submission to Petitioner's jury of a circumstance of his crime being unusually wanton, vile or involving torture or depravity of mind. Rather, it is only his status as an inmate at the time of his crime which allows him to be under a capital sentence.

As in Godfrey v. Georgia, supra, this Court should exercize its supervisory powers to define whether a death sentence, based soley on the aggravating circumstance and facts below, complies with Constitutional requirements of equal protection and freedom from cruel and unusual punishment.

Thirdly, the Missouri Supreme Court's opinion erred in allowing the Petitioner's conviction to stand where the prosecutor, over defense objections throughout trial and in the appellate court, was allowed to present evidence that Petitioner at the time of the homicide below was under separate charges of rape and kidnapping. That knowledge prejudiced Petitioner in the minds of the jury and injected inflamatory and irrelevant material in violation of Petitioner's right to Due Process under the Fifth and Fourteenth Amendments to the Constitution of the United States, and renders his sentence of death invalid under the Eighth Amendment.

The prosecuting attorney in his opening statement told the juty that he would produce evidence that Petitioner, prior to the killing, told other prisoners that he was going to commit a capital murder in order to escape going to the penitentiary for the crives of rape and kidnapping of little girls, the charges upon which Petitioner was awaiting trial

at the time. The prosecutor continued to emphasize the other crimes in the testimony of witnesses, particularly three who were allowed to testify over a defense objection that Petitioner had made such statements to them while they were in the jail. The other charges were also raised in the prosecutors closing argument and gratuitously injected in his cross examination of Petitioner contrary to Missouri law. The rationale for doing so was to prove motive, of which there was sufficient other evidence.

Lockett v. Ohio, 438 U.S. 586 (1978) recognized that due to the finality of the death penalty, questions which might otherwise be resolved in favor of the state, must be resolved in favor of a defendant and where such prejudice is possible, a conviction cannot stand.

This Court recognized in Presnell v. Georgia, 439 U.S. 14 (1978) that a death sentence based on underlying charges on which Defendant had not been tried or convicted could not stand. That case was slightly different in that the Presnell court used the prior charges as a specific basis for the death penalty. The principal should be applied in any case in which an individual faces death at the hands of the state. Where evidence of other, unconnected crimes is paraded before the jury and likely to influence them, a conviction in the light of such evidence is violative of Due Process. As stated in Gardner v. Florida, 430 U.S. 349 (1977), it is vital that any sentence of death be based on reason and not caprice or emotion.

In this case we cannot be certain that the evidence did not arouse caprice and emotion to a very large extent. That is particularly the case in the light of the jury's verdict which stated that the death penalty was to be imposed because Petitioner committed the crime while in lawful custody and, in

the jury's words, "to deter future acts of violents".(sic) It is certainly possible that the jury was referring to deterring Petitioner from other crimes, and, if so it follows that the evidence of the charges upon which the Petitioner had not yet been convicted was, in large measure, determinative. That fact would then be analogous to the situation struck down in Presnell, with Petitioner's sentence based impermissibly on other crimes, which would accordingly necessitate its reversal.

It is further submitted that certiorari is compelled in this case to consider whether the procedure below of the state's giving notice of the aggravating circumstances complies with the notice requirements of Due Process.

The disclosure below, provided a mere thirty days prior to trial, merely lists three aggravating circumstances, verbatim, from Section 565.012 RSMo. That mere listing is not sufficient notice of the evidence of the aggravating circumstances on which the state intends to rely.

The statute clearly intends that notice shall be given to the defendant, as in an information or indictment of exactly those facts in aggravation, and witnesses to support those facts, which the state will produce. Section 565.006 states, "Only such evidence in aggravation as the prosecution has made known to the Defendant prior to his trial shall be admissable." 565.006(2) RSMo.

Clearly that language intends that facts, which the state will use to support a statutory aggravating circumstance must be made available to the Defendant prior to the penalty phase, and , no such aggravating circumstance can be submitted to the jury by instruction if Defendant has not received such notice and if said evidence in not presented sufficient to convince the jury beyond a reasonable doubt. Gregg v. Georgia, supra.

The Notice contemplated by the statute would be similar to an information which is required, not merely to set out the words of the statute as to the crime charged, but to give a defendant the factual background which would bring the conduct of Defendant with that particular statutes's elements.

The notice required by the statute should be analagous to an addiditional information or pleading the state is required to file if it wishes to rely on an aggravating circumstance in seeking the death penalty.

Therefore, as the prosecution below did not present any factual basis for the aggravating circumstances disclosed to the defense, or state any witnesses or facts on which to base the circumstance and to be presented to the jury in aggravation during the penalty phase, the trial court should have properly stricken their disclosure. Allowing said disclosure to remain in the record, and issuing instruction thereon violated Petitioner's rights to Due Process in that he was unable to prepare his defense of the penalty phase, and thus the death penalty based on a jury's verdict following the above improper procedure cannot stand and would be violative of the Due Process clauses of the Fifth and Fourteenth Amendments and constitute cruel and unusual punishment under the Eighth Amendment, thus compelling the intervention of this Court to determine how specific a notice must be given before a state can present an aggravating circumstance.

As stated previously, the state was allowed in its closing argument at Petitioner's trial to argue the range of punishment contrary to Section 565.006 RSMo. The statute provides that punishment should not be considered in the guilt or innocence phase and the prosecutor's statements

to jury was in clear violation thereof. This Court should consider the extent to which a sentence of death can be imposed when the prosecutor at trial has clearly stepped beyond the bounds of evidence and argument authorized by the statute and presented the jury factors which the statute clearly prohibits it from considering. The opinion of the Missouri Supreme Court below is clearly contrary to this Court's admonition in Godfrey that Capital Murder statutes be strictly adheard to before a death sentence can be imposed.

This Court in Lockett v. Ohio, supra, enunciated an enhance standard of Due Process indicating that improperties in the state's presentation of its case which might be allowed to stand in less serious cases could not be allowed to exist where a defendant is on trial for his life.

To allow the sentence of death to stand in the light of the statute's violation clearly deprives the Petitioner of his rights to Due Process of Law and Equal Protection thereof as set forth in the Fifth and Fourteenth Amendments and the sentence of death imposed as a result of such violations is clearly cruel and unusual punishment in violation of the Eighth Amendment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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en banc

STATE OF MISSOURI,
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vs.

PATRICK E. TRIMBLE,
Appellant.

No. 62523

APPEAL FROM THE CIRCUIT COURT OF CASS COUNTY
The Honorable Robert G. Russell, Judge

The appellant, Patrick E. Trimble, was tried to a jury which found him guilty of capital murder and assessed his punishment at death. Secs. 565.001, 565.008 and 565.012, RSMo 1978. Judgment was entered accordingly and he has appealed to this Court which has exclusive appellate jurisdiction by reason of Section 3 of Article V of the Constitution of Missouri. Having reviewed and considered all errors enumerated by way of appeal and the sentence as mandated by § 565.014, RSMo 1978, the same is affirmed.

At the trial, evidence was presented from which the jury could find the following facts beyond a reasonable doubt:

The victim, Jerry James Everett, a white male, twenty years of age, had been arrested on charges of stealing a van and placed in the St. Charles County jail around October 28, 1979. Appellant, also a twenty year old white male, arrived approximately two days later to await disposition of charges of kidnapping, raping and sodomizing two nine year old girls.

The evidence shows that appellant was dissatisfied with the

prospect of serving time under the pending charges because he believed that penitentiary inmates have little use for those "up" on such charges and would make life difficult and dangerous for him. He stated, to three different inmates of the St. Charles County Jail, that he intended to "catch something bigger" and would commit a "capital murder," killing either another inmate or a guard.

Sometime during the week or so before November 12, 1979, appellant, who weighed approximately 210 lbs. and was 6'1" tall, settled upon Jerry Everett, who weighed approximately 145 lbs. and was 5'10" tall, as his victim. The evidence shows that Everett was mentally slow and may never have fully comprehended what was happening to him. Several inmates observed that he was mentally slow, and his mother testified that he had had some drug problems, had run away from home on numerous occasions, had begun to withdraw at around age 16, had become a loner and had received inpatient counseling in a hospital in Memphis, Tennessee. She also stated that he had difficulty writing and that it was unlikely that he knew his jail address. She had even had to send him the address for the home where he had lived.

On numerous occasions, appellant, with the jail's other inmates, took Everett's food after winning it in card games that the victim did not understand and could not play competently. Appellant placed burning matches between his victim's toes while he slept and at one point burned what appeared to be letters into Everett's right forearm by using a burning plastic shampoo bottle to administer this torture. Expert testimony indicated that these burns were <u>one half inch deep</u> at the autopsy.

The evidence showed that appellant treated the victim as his "punk" or homosexual partner. He forced the victim to have both oral and anal intercourse with him, compelled him to wear a "bra" around the jail for the entertainment of the other inmates, and forced him at one point to display to the other inmates a rag that had been stuffed into his anus. Appellant made his victim offer kisses to the other inmates and offered to sell him to a jail trustee for a carton

of cigarettes. He completed this pattern of torture and homosexual abuse by repeated beatings and by compelling Everett to sweep and mop the four jail cells in the block on several different occasions, following Everett around while he worked and beating him with his fists when he failed to comply.

On Sunday, November 11, appellant told Kenneth Schwab and John Rice that he intended to kill Everett to keep him from informing the authorities, when he went to court on November 13, of the sexual abuse he had suffered. This motive appears to have superseded his earlier motive because appellant devised a scheme to hide his crime rather than publish it to the penitentiary society. The day before the killing, he compelled Everett to write a suicide note to his parents, explaining that he could not live away from them and telling them not to cry for him because he had accepted the Lord into his life. The evidence showed that the victim was quite religious, having accepted Jesus into his life years before; that he spent much of his time in jail reading the Bible; and, that appellant had initially maneuvered himself into the victim's confidence by representing himself as a minister. The note was written on paper and placed in an addressed and stamped envelope, both of which the victim's mother had given him. Appellant dictated its contents after telling Donald Hill he was going to have Everett write a suicide note.

Appellant further prepared for the slaying by tying strips of towels together and had one of the inmates assist him in testing their strength. Shortly after dinner on November 12, 1979, appellant took Everett to Everett's cell and there placed a blanket around him, which he described as Everett's "dress." He told his victim that they were going to play the "hangman's game." Appellant compelled Everett to sit in front of him on the floor while appellant sat on one of the bunks with Everett's back and head braced against appellant's knees. Appellant placed a towel in his victim's mouth; and then, in the course of fifteen to twenty minutes, he strangled Everett by twisting a towel around his neck. At some point, Everett's neck was

fractured. Appellant made the remark to one inmate that it took a very long time to kill Everett.

Several inmates testified in addition to the above facts that they saw appellant trying to lift Everett's body up to where appellant had tied a strip of towel on the upper bars of the cell. None, however, ever observed Everett hanging from this towel.

Shortly after the strangulation, appellant called the inmates to his cell and told them that his plan was to make the death look like a suicide and that they were to say they were all watching t.v. when it occurred. He told them that he had connections on the outside and indicated that he would have them killed if they told on him. He then returned to Everett's cell and directed one of the inmates, John Rice, to call the guards. When they arrived, they observed appellant removing a towel from Everett's neck and appellant and Alvin Tate, who was Everett's cell mate, lifting Everett's body into the hallway. The guards ordered the inmates into their cells and unsuccessfully attempted to revive Everett. Initially, the inmates told the authorities that they had been watching t.v. and thought Everett had committed suicide. Later, however, a total of nine inmates made statements to the police investigators establishing the above facts: three who heard appellant express his intention to commit a "capital murder" to avoid going up on charges of raping, sodomizing and kidnapping children and who were released from the jail a week before the slaying; and six who were eyewitnesses to the torture, sexual abuse and strangulation.

POINT I

Appellant contends, in his first point, that the trial court erred in overruling his motion for a new trial and sentencing him to death because the jury conducted itself improperly in that its verdict that appellant should receive the death penalty was not clearly based upon a finding of a statutory aggravating circumstance.

At the trial, after the jury had returned a guilty verdict on the charge of capital murder, the court instructed the jury that it

could assess the death penalty if it found either of two aggravating circumstances: (1) that at the time of the murder of Jerry James Everett the defendant was in the lawful custody of a place of confinement; or (2) that the murder of Jerry James Everett was committed for the purpose of avoiding a lawful arrest of defendant. The jury returned the following verdict on punishment:

"We, the jury, having found the defendant Patrick E. Trimble guilty of the capital murder of Jerry James Everett, fix the defendant's punishment at death, and we designate the following aggravating circumstance or circumstances which we find beyond a reasonable doubt: that at the time of the murder of Jerry James Everett the defendant was in the lawful custody of a place of confinement and as a deterrent to further acts of violents [sic]." This verdict was returned at 10:14 p.m. At 10:06 p.m., the jury had sent a note to the court with the following inquiry: "The jury would like to know, if all we have to put on the verdict form is 'that at the time of the murder of Jerry Everett the defendant was in the lawful custody of a place of confinement.' We are referring to the form for the death penalty. Or do we have to go into lengthy detail." The court sent the following answer at 10:10 p.m.: "I have received your communication. I cannot make any comment or further instructions to you. I can only refer you to the instructions which you already have with you."

The question presented is whether the jury based its verdict upon a statutory aggravating circumstance or whether it exceeded the bounds of its discretion and based its verdict upon a rationale of its own devising. Appellant contends that the verdict is ambiguous on its face and that it is unclear whether the jury would have assessed the death penalty upon a finding of the designated statutory aggravating circumstance alone. He argues that this court is unable to review the action of the jury and must, therefore, find that it has acted in an arbitrary and capricious manner. We disagree.

Requiring that the jury find a statutory aggravating circumstance is designed to prevent the arbitrary and capricious imposition of

death sentences. Finding a statutory aggravating circumstance, however, is only a threshold requirement that must be met before the jury can, after considering all the evidence, recommend the death sentence. State v. Bolder, ____ S.W.2d at ____ (Emphasis added) (No. 62362, handed down July 6, 1982). The statutory aggravating circumstance is to channel the jury's discretion. The jury in the instant case affirmed the presence of the one aggravating circumstance specified in its verdict, and the evidence supports that finding. Cf. State v. Mercer, 618 S.W.2d 1, 10, n.5 (Mo. banc 1981) and State v. Robert Baker, ____ S.W.2d ____ (Mo. banc 1982) (handed down August __, 1982). In addition thereto, the jury added the words "... as a deterrent to further acts of violents [sic]." On reflection thereof, we do not find such action indicative of any arbitrary or capricious conduct and rule the same to be merely harmless surplusage. In passing, we do note that "deterrence" historically has been a permissible consideration whenever appropriate punishments for crimes have been the issue. {not esp of sentence of death + esp. not to let on except

POINT II

Appellant argues that the trial court erred in refusing his motion for a mistrial when the prosecutor referred to appellant's having been charged with rape and kidnapping in his opening and closing statements and in his examination of witnesses. He contends that the prejudicial quality of this evidence outweighed its probative value as to motive and that the trial court abused its discretion because the state had other available evidence equally probative of motive.

A criminal defendant has the right to be tried only for the crime or crimes with which he is charged, and the admission of evidence of unrelated crimes is prejudicial because it may result in a conviction founded upon crimes of which the defendant was not accused. Thus, evidence of other crimes is admissible only where it has a legitimate tendency to establish that the defendant is guilty of the immediate crime charged. Evidence thereof is admissible where it

tends to establish motive, intent, the absence of mistake or accident, a common scheme or plan embracing the commission of two or more crimes so related that proof of one tends to establish the other, or the identity of the person charged with the commission of the crime on trial.

Appellant's argument that prejudicial albeit relevant evidence should be excluded was raised in State v. Shaw, ____ S.W.2d ____ (Mo. banc 1982) (No. 62679, handed down August 2, 1982), and there we stated that relevance, not prejudice, is the touchstone of due process and that the question of whether the prejudicial effect of evidence outweighs its probative value rests within the sound discretion of the trial court. Id. at 8. We do not find that the trial court abused its discretion. Here the evidence was highly probative of material elements of the crime of capital murder, namely deliberation and premeditation; and it was probative of appellant's motive for the crime. At least ten days before the slaying, appellant had formed the intent to commit a "capital murder." Who his victim was did not particularly concern him because his motive was simply to earn the respect and fear of his prison peers and to cover the stain of having sexually abused little girls. The evidence of the prior crimes brings into sharp focus appellant's intent by illuminating his motive. This court notes, moreover, that the trial court refused to allow the state to argue the specific offenses to the jury in closing argument and instructed it to disregard the state's references to the specific crimes. While we will not say the trial court would have abused its discretion had it ruled otherwise, we do note that the trial court's conduct probably lessened whatever inflammatory impact the evidence may have had upon the jury. We find that the evidence was relevant to intent and motive and that the trial court did not abuse its sound discretion in the manner in which it allowed the jury to receive the same.

POINT III

Appellant next contends that the trial court erred in instructing

the jury that it could find as an aggravating circumstance that the capital murder had occurred while appellant was in the lawful custody of a place of confinement because the state had presented no evidence that the custody was lawful. Appellant argues that the state must prove beyond a reasonable doubt that his initial arrest and custody were lawful, e.g., that there was probable cause for his arrest. We disagree.

The meaning of "lawful custody" in § 565.012.2(9), RSMo 1978, has not been construed. Therefore, we hold that this phrase means "custody under color of law," that is, in the custody of a lawful authority. The adjective "lawful" takes as its definiendum the authority enforcing the confinement and not the custody. We agree with the state that the statute impliedly distinguishes between custody by a lawful authority and confinement by a legally unauthorized person or entity. The reasons are threefold:

First, the contrary construction would not square with other statutes and the earlier pronouncements of this court that construe those statutes. This court has recently noted in construing § 575.150.3 RSMo 1978, that it is no defense to prosecution for wounding an officer while he is actively engaged in performing his lawful duties that the arrest was without probable cause, State v. Thomas, 625 S.W.2d 115, 121 (Mo. 1981); nor is it a defense that the law that a defendant was arrested for violating was unconstitutional. Id. It is no defense to the crimes of escape or resisting arrest that the confinement was illegal. State v. Croney, 425 S.W.2d 65, 68 (Mo. 1968). §§ 575.150.3 and 575.210, RSMo 1978. State v. Croney held that: "where the imprisonment is under color of law, the prisoner is not entitled to resort to self-help but must apply for his release through regular legal channels." State v. Thomas, supra, at 122, held that because a defendant has no right to resist an unlawful arrest by a known police officer, his resistance cannot be condoned by reducing the degree of the resulting offense. Clearly, it would be no defense to capital murder that the defendant was incarcerated

unlawfully; and, it would be inconsistent with the policies and reasons underlying the above cited cases and statutes now to hold that the aggravating circumstance of a capital murder in a place of lawful confinement is negated where the underlying arrest, for example, was not lawful.

Second, a distinction between custody by a lawful authority and confinement by a legally unauthorized person is consistent with basic tort law and serves a legitimate state purpose. Where one is confined by a legally unauthorized person, one has the right of self-defense. However, one does not have the right of self-defense where custody is by a lawful authority unless the authority uses unlawful force. The policy underlying the distinction is that underlying the statutory aggravating circumstances to protect the authorities who are lawfully appointed to administrate and guard penal facilities. State v. Bolder, supra, at 12; State v. Shaw, supra, at 11.

Third, to hold to the contrary would be to render the death penalty flowing from this aggravating circumstance arbitrary and capricious because the penalty given would depend not upon the defendant's conduct or circumstances under his control, but, rather, upon the conduct of the police in making an illegal arrest or of the legislature in enacting a bad law.

We hold that the state was required to show only that the custody was under color of law and that the evidence presented was sufficient to support a finding beyond a reasonable doubt that appellant committed a capital murder while in the lawful custody of a place of confinement.

POINT IV

Appellant next argues that the judgment must be reversed and the case remanded because the state argued punishment in closing argument before the jury had determined guilt. This argument is raised for the first time on appeal--indeed, the alleged error was invited at the trial--and must be reviewed under the plain error rule, Rule 29.12(b); and "alleged errors on closing argument do not justify relief under [the plain error rule] unless they are determined to have a decisive effect on the jury." State v. Murphy, 592 S.W.2d 727, 732 (Mo. banc 1979).

Section 565.006, RSMo 1978, states that "[a]t the conclusion of all trials upon an indictment or information for capital murder heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment." MAI-CR 15.00 Supplemental Notes on Use state that "[i]f capital murder is submitted to the jury, the punishment for that offense and for any lesser included offense submitted therewith must be omitted, even though the death penalty for capital murder has been waived."

Clearly, it would have been error for the court to have instructed the jury on punishment in the guilt phase of the trial. The court, however, did not instruct on punishment, and so appellant's argument is really only an allegation that the court did not exercise adequate control of the arguments. The trial court has considerable discretion in allowing or rejecting argument of counsel, and its rulings are reversible only for abuse of discretion where argument is plainly unwarranted. State v. Moore, 620 S.W.2d 370 (Mo. 1981). Moreover, appellant must show that the abuse of that discretion prejudiced him. State v. Wood, 596 S.W.2d 394 (Mo. banc 1980), cert. denied, 449 U.S. 876 (1981).

Appellant's trial counsel indicated to the court his intention to describe the penalties in his closing argument before the jury determined guilt. In light of this court's statements in State v.

Holt, 592 S.W.2d 759, 764 (Mo. banc 1980), that a jury may properly consider punishment in choosing to convict on second degree murder rather than capital murder, appellant's request at trial was not unreasonable and the trial court did not abuse its discretion in acceding to this request. Appellant cannot now be heard to complain that the prosecutor described the penalties. That appellant's trial counsel did not actually avail himself of the opportunity is of no moment because the prosecutor could not know that appellant would state in the instruction conference that he would so argue and then not argue the point after the state had.[1]

We note, finally, upon review of the whole record that the state did not "argue" punishment. It restricted itself to a simple, declarative statement of the penalties for each degree of homicide charged. In all, the court did not abuse its discretion in acceding to the reasonable demands of counsel, and the state's argument did not prejudice appellant. Therefore, the point is denied.

POINT V

Appellant next alleges that the trial court erred in failing to strike the state's notice of evidence of aggravating circumstances because it did not give him adequate notice or opportunity to prepare. Specifically, appellant contends that a disclosure of aggravating circumstances must comply with Rule 23.01 and provide a defendant with notice of the aggravating circumstance, the specific evidence

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1. We here neither hold nor imply that the state can introduce the issue of punishment into the guilt phase of the trial where a defendant has not. State v. Holt is not a two edged sword that may be used generally to break down the bifurcated structure of a capital murder trial.

supporting that circumstance and the names and addresses of all material witnesses. We disagree.

Section 565.006.2, RSMo 1978, states that "[o]nly such evidence in aggravation as the prosecution has made known to the defendant prior to his trial shall be admissible." The statute does not state or suggest that something on the order of a separate indictment or information is required. We decline the invitation to read useless requirements into the statute. Under Rule 23.01, defendants currently receive specific notice of the crimes for which they are charged, facts constituting the offense and the time and place of the offense. Additionally, they receive notice of what witnesses will testify against them. We believe that notice of the aggravating circumstances that goes no further than the language of the statute is sufficient where the information states facts sufficient to give notice of the crime charged and contains the names of all witnesses from whom may be discovered the evidence of the aggravating circumstances. Such notice is all the process that is due even where the death penalty may be imposed. Here appellant received notice of the aggravating circumstances on June 23, 1980, a month before trial, and received the Information on January 29, 1980. Together, the notice of aggravating circumstances and the Information were sufficient notice.

POINT VI

Appellant next contends that the trial court erred in permitting three police officers to testify as to the reputation of the appellant for veracity and truthfulness. He also contends that even if such testimony was proper, it was error not to strike the witnesses' volunteered opinions as to his veracity. Since these issues are first raised on appeal, we will review them only as plain error under Rule 29.12(b). We find no error.

When a witness takes the stand, he places his reputation for truthfulness and veracity in issue and the state may then offer evidence of his general reputation for truthfulness and veracity. State v. Brookshire, 368 S.W.2d 373, 385 (Mo. 1963). Here, appellant had

testified in his own behalf, and the court did not err "plainly" or otherwise in permitting the witnesses to testify as to appellant's reputation for veracity and truthfulness.

Generally, a witness should not testify as to his opinion of the accused's character. State v. Antwine, 506 S.W.2d 397, 399 (Mo. 1974). Federal Rule 405, however, permits such evidence, and opinion evidence on veracity and truthfulness cannot be said generally to violate due process. The classic rationale of the reputation-only rule was stated in People v. Van Gaashick, 189 N.Y. 408, 82 N.E. 718 (1907); classic because it is the oft quoted answer to Wigmore's argument for the admissibility of opinion evidence of character. 7 Wigmore, Evidence § 1986 (3d ed., 1940). The thrust of Van Gaashick was that permitting opinion evidence would lead to endless inquiries into the basis of opinions and innumerable collateral disputes. This is not a due process concern except insofar as a defendant is denied due process when a jury becomes confused by collateral issues. In the case at bar, no confusion of constitutional magnitude resulted because the state itself put a stop to the witnesses' attempts to express their opinions. Thus, we cannot say that appellant suffered manifest injustice when the court did not strike the witnesses' testimony sua sponta, and the point is denied.

POINT VII

Appellant next contends that the trial court erred in not striking on its own motion the testimony of the victim's mother because it was not relevant and was inflammatory. Again, we will review this issue under the plain error rule, Rule 29.12(b), because appellant raised it on appeal for the first time. We find no error.

At the trial, appellant placed the victim's mental state in issue, testifying that he discovered Everett hanging by the neck from the bars. Additionally, a suicide note was discovered on Everett's bunk, and the state's witnesses testified that appellant stated that he would have Everett write a suicide note and that they saw him dictating to Everett as Everett wrote. The note was as follows and

was placed in a stamped envelope with return address:

"Dear Mom and Dad

I'm sorry to have to send this letter but, I can't handle the pressure of being away from You and Dad. I know I've caused you both a lot of sorry and pain. So I fell its best this way. I love you both very much, and please don't cry, because I have accepted the Lord into my life, and I know I will, go to heaven, remember me always

Your Son
Jerry Everett [sic]"

The victim's mother testified that her son had been a Christian for years and had not been converted recently as the note suggested. She stated that he had had some personal problems: he had the mental age of 12 or 13; he was a loner, having begun to withdraw at about age 16; he had had some drug problems. She testified that he had recently received counseling and appeared to be improving; that the family had recently been fishing in Canada and was planning a sailboat trip when Jerry was arrested; and, that he had enjoyed and was looking forward to these trips. Finally, the witness testified that the letter did not seem authentic because Jerry's spelling and composition were normally poor, he did not ever sign his mail, he would not know his return address and he had not lived with his parents for some time.

Questions of relevancy are left to the discretion of the trial court and its ruling will be disturbed only if an abuse of discretion is shown. State v. Wood, 596 S.W.2d 394, 402 (Mo. banc 1980). Whether potentially prejudicial or inflammatory evidence is admitted is within the trial court's discretion, and relevancy is the principal criterion. Id. at 403. Our review of the record does not show that the trial court abused its discretion, and the point is denied.

POINT VIII

In his final point, appellant levels several constitutional attacks upon §§ 565.001, 565.003, 565.006, 565.008 and 565.016, RSMo 1978. Specifically, he contends that the imposition of the death penalty is arbitrary and capricious because (1) the prosecutor has

discretion to charge capital murder in a particular case; (2) the jury has unbridled discretion because it can find a defendant not guilty of capital murder and guilty of a lesser included offense; (3) the mechanism by which the court can compare homicides committed in a jail or other penal institution is inadequate; (4) the imposition of the death penalty in this case does not implement a legitimate state interest; and (5) the death penalty has not been shown to be a deterrent. Finally, appellant argues that the statutes are vague and overbroad and violate the Equal Protection Clause.

A.

That the prosecutor has discretion in charging capital murder does not render the death penalty arbitrary and capricious, Gregg v. Georgia, 428 U.S. 153, 199 (1976), nor does the jury's discretion to acquit a defendant of capital murder and convict him of a lesser included offense. In Gregg, the United States Supreme Court stated:

> The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. Furman, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense.

Discretionary acts before the sentencing phase are irrelevant to whether the death penalty is arbitrary and capricious. Only discretionary acts that concern punishment and that occur after conviction for capital murder are relevant to this issue. Thus, the prosecutor's discretion to prosecute and the jury's discretion to acquit of capital murder are irrelevant. Similarly, the mechanism by which this court compares capital murders committed in jails or other penal institutions need not include "cases such as those in which the state chose not to charge a defendant with capital murder, the state agreed to a plea bargain whereby a defendant pled guilty to a lesser charge, the conviction was for an offense less than capital murder, or the state waived the death penalty." State v. Bolder, supra, at 16-17. And, thus, the mechanism by which this court will compare appellant's case to other capital murder cases in Missouri is adequate although it

does not compare capital murder cases with lesser degrees of homicide or with cases where no charges were brought and does not compare the treatment of defendants at the charging and plea bargaining stages.

B.

State v. Bolder, supra, at 12, stated that the legislature, in adopting § 565.012.2(9), RSMo 1978, reasonably could have concluded that the death penalty is appropriate "when imprisonment already imposed does not deter capital murder. The imposition of capital punishment is rationally related to the state's obviously legitimate interests in preventing crime and protecting other persons, such as prison employees and other inmates, with whom prisoners come in contact." Appellant argues that because he had not been convicted and was merely awaiting trial when he committed the capital murder, the legitimate purposes of the statute would not be served by imposing the death penalty. The legitimate state purpose expressed in the statute is not merely to deter capital murder in prisons where imprisonment may not, but to deter them in every case. It is not a condition precedent to the death penalty for capital murder with the aggravating circumstance that the killing was in a prison that the defendant previously had been given a life sentence. That this court has found, employing a rational basis test (see Bolder, supra, at 11) that the legislature legitimately could have considered those instances where imprisonment was not an adequate deterrent does not foreclose our finding, under a rational basis test, that the legislature legitimately could have aimed this aggravating circumstance at deterring all capital murders in any prison. The legislature may have had several reasons: deterring those otherwise undeterred; protecting prison guards who daily serve the state in a dangerous environment; and protecting other prison inmates who are relatively defenseless in the prison environment. In State v. Shaw, supra, at 16, we said that "[t]hose imprisoned for violating our laws have cast upon the state both the expense of, and the responsibility for, their safe care while in confinement."

C.

Appellant argues that the death penalty has not been shown to be a deterrent and, therefore, is cruel and unusual punishment. This question was raised and disposed of in Gregg v. Georgia, supra, at 183-88. The legislature rationally could determine that the death penalty is a deterrent. Moreover, the death penalty has other legitimate purposes, namely, incapacitation and retribution.

D.

Appellant argues, finally, that the statutes are vague and overbroad and violate Equal Protection. He offers no reason for sustaining this claim, and we see no reason to reconsider our previous holdings in State v. Newlon, 627 S.W.2d 606, 162-13 (Mo. banc 1982), petition for cert. filed, ____ U.S.L.W. ____ (U.S. May 5, 1982) (No. 816660), and State v. Bolder, supra, at 11 et. seq., which held that the aggravating circumstance for which appellant was sentenced to death does not violate the Equal Protection Clause. The point is denied.

POINT IX

Section 565.014.1 mandates that we review the death sentence where it is imposed. Section 565.014.3 provides:

> With regard to the sentence, the supreme court shall determine:
>
> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
>
> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 565.012; and
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Our review of the entire record convinces us that the sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor.

Section 565.012.2(9), RSMo 1978, provides as a statutory aggravating circumstance that "[t]he capital murder was committed by a person in ... the lawful custody of a ... place of lawful confinement."

The jury so found, and the evidence supports its findings.

Our final consideration is whether the death penalty, taking into account both the crime and the defendant, is excessive or disproportionate to the penalty imposed in similar cases. Since the enactment of our current capital murder statute, § 565.001, this Court has reviewed and affirmed four death sentences. State v. Shaw, ____ S.W.2d ____ (Mo. banc 1982) (No. 62679, handed down August 2, 1982);[2] State v. Bolder, ___ S.W.2d ____ (Mo. banc 1982); State v. Newlon, 627 S.W.2d 606 (Mo. banc 1982), petition for cert. filed, ____ U.S.L.W. ____ (U.S. May 5, 1982) (No. 81-6660); State v. Mercer, 618 S.W.2d 1 (Mo. banc), cert. denied, 102 S. Ct. 432 (1981). We have reversed one death sentence because of its disproportionality. State v. McIlvoy, 629 S.W.2d 333 (Mo. banc 1982). In addition to Shaw, Bolder, Newlon, and Mercer, we have affirmed twelve capital cases in which the choice of death or life imprisonment without possibility of parole for fifty years was submitted to the jury. State v. Greathouse, 627 S.W.2d 592 (Mo. 1982); State v. Bostic, 625 S.W.2d 128 (Mo. 1981); State v. Thomas, 625 S.W.2d 115 (Mo. 1981); State v. Emerson, 623 S.W.2d 252 (Mo. 1981); State v. Turner, 623 S.W.2d 4 (Mo. banc 1981), cert. denied, 102 S. Ct. 1982 (1982); State v. Jensen, 621 S.W.2d 263 (Mo. 1981); State v. Baskerville, 616 S.W.2d 839 (Mo. 1981); State v. Mitchell, 611 S.W.2d 223 (Mo. banc 1981); State v. Williams, 611 S.W.2d 26 (Mo. banc 1981); State v. Royal, 610 S.W.2d 946 (Mo. banc 1981); State v. Borden, 605 S.W.2d 88 (Mo. banc 1980); State v. Downs, 593 S.W.2d 535 (Mo. 1980).

We have decided two cases in which the statutory aggravating circumstance was that the capital murder was committed by a person in the lawful custody of a place of lawful confinement. In State v. Shaw, supra, the defendant killed a corrections employee engaged in

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2. We have solicited the cases below, which we have again surveyed, from State v. Shaw, supra.

the performance of his official duty. In State v. Bolder, supra, as here, the defendant killed another inmate. We find that in exercising its discretion to impose the death penalty after finding the existence of the aggravating circumstance, the jury did not impose a sentence that was excessive or disproportionate.

It is a rare case where a defendant announces his intent to commit a "capital murder" by slaying either a guard or another inmate a week before he does so. It is rare for a defendant to commit a capital murder in order merely to rise in the estimation of his criminal peers with no particular preference as to victim. It is unparalleled that after announcing these aspirations to other inmates that a defendant should set about a week long starving, beating, burning and sexual abuse of an inmate much smaller in size than he and especially vulnerable because of age, experience and mental deficiency. The evidence shows that appellant slew his victim in the confines of a prison in the manner of an execution, and this court finds that the death penalty for appellant is neither disproportionate nor excessive.

Finding no reversible error, the judgment should be and is hereby affirmed.

J. P. MORGAN, Judge

Donnelly, C.J., Rendlen, Welliver, Higgins and Bardgett, JJ., concur; Seiler, J., concurs in result in separate opinion filed.

Execution date set for October 16, 1982.

DUPLICATE
OF FILING ON

AUG 31 1982

IN OFFICE OF
CLERK SUPREME COURT

Supreme Court of Missouri

en banc

STATE OF MISSOURI,
Respondent,
vs.
PATRICK E. TRIMBLE,
Appellant.

No. 62523

OPINION CONCURRING IN RESULT

While I doubt that the death penalty does more good than it does harm, my personal views are not important and under compulsion of the previous cases wherein this court has upheld the death penalty, I concur in the outcome of the present case.

Something should be said about the appalling lack of supervision in the St. Charles County jail which this case brings to light. One cannot read what happened to the victim without wondering how the abuse could have gone unnoticed or undiscovered by the sheriff, who is by law in charge of the jail, § 221.020, RSMo 1978, or his deputies or jailers. The abuse went on for over a week prior to the actual killing. Evidently there is no supervision whatever exercised in St. Charles County over the jail and the prisoners are free to run wild and do as they please with one another. Those who are supposed to be in charge of the jail look the other way or designate an inmate trusty as jailer, a system which leads to deplorable abuses.

What was permitted to take place in the St. Charles County jail is a public disgrace. The principal opinion speaks about the state having the responsibility for the safe care of those in confinement. That

responsibility obviously means nothing in the St. Charles County jail. "All hope abandon, ye who enter here" would be a fitting inscription for its portals, just as over the gates of Dante's Hell.

Robert E. Seiler, Judge

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI, Plaintiff-Respondent,	)	
vs.	)	No. 62523
PATRICK E. TRIMBLE, Defendant-Appellant.	)	

MOTION FOR RE-HEARING

Jurisdiction

The Court's opinion in the above captioned cause was filed on August 31, 1982. A copy of this Motion has been mailed to the Attorney General, Attorney for Respondent, and the Motion has been filed within 15 days of the opinion.

Grounds

The Appellant moves the Court to Re-Hear the above cause as the following material matters of law and fact have been overlooked and misinterpreted by the Court.

1. The Court's opinion in Point I ignores the clear guidance furnished by the United States Supreme Court cases cited by Appellant in his brief in holding that the statutory aggravating circumstance is "only a threshold requirement that must be met before the jury can, after considering all the evidence, recommend the death sentence". The specific requirement that the jury find an aggravating circumstance beyond a reasonable doubt was enacted to eliminate the arbitrary and discriminatory application of the death penalty. Gregg V. Georgia, 428 U. S. 153 (1976); Godfrey V. Georg 446 U. S. 420 (1980).

While those cases allow consideration of the circumstances surrounding the crime itself and the offender, they do not allow a jury an unbridled discretion once an aggravating circumstance is found. Rather, the aggravating circumstance must be the reason for the death penalty, and then, under Missouri law as outlined in the Instructi the jury must consider whether some factor would mitigate the imposition of a sentence of death.

The Court's opinion mistakenly compares this case to that of State V. Bolder, (No. 62362, July 6, 1982.) In Bolder the jury

added words to its verdict indicating that is was imposing a sentence of death due to the fact that Bolder was already serving a sentence of life imprisonment for committing a murder. Since that sentence had not deterred him from taking another life the death penalty was imposed.

The facts of this case are different from Bolder. The jury added to its verdict form below the words, ". . . as a deterrent to further acts of violents (sic)".

Those words go far beyond mere harmless surplusage. To the extent that Appellant may have received a sentence of death to deter others and be amde an example of, the decision of the jury would be arbitrary and capricious and clearly unjustified and unconstitutional While "deterrence" may historically have been a pemissible considération for a legislature in determining the possible ranges of punishment for any given crime, a sentence of death is clearly improper if based on that factor, where the possibility exists, as in this case, that the mere presence of an aggravating circumstance in and of itself would not have convinced the jury to impose it.

To hold as the Court's opinion that the aggravating circumstance is mere threshhold would allow the jury, once it is found, to impose a sentence of death based race, poverty, political unpopularity or any number of clearly inpermissable arbitrary and capricious factors having nothing to do with the particular offender or crime involved. The opinion of Court misinterprets the prior cases cited and misapplies the facts of Bolder to this case.

2. The Court's opinion, in determining whether the trial Court abused its discretion in allowing predudicial evidence concerning the rape and kidnapping charges on which Appellant was held the time of the alledged offense, overlooked material facts in making that determination.

The evidence presented by the State herein was that at the time of the death of Mr. Everett, he was killed by Appellant to cover up the prior abuses to which he had alledgedly been subjected. An elaborate scheme was described by the State in its evidence by which the Appellant attemted to make death look like suicide. Several State

winesses testified that they witnessed the writing of the suicide note and had been told of Appellant's intentions concerning the cover-up a long time prior to its occurrence.

The State had no problem proving motive, intent, deliberation, and premeditation. The evidence concerning Appellant's other charges would, in fact, be contradictory to the cover up motive and in that sense not help the State's case.

Clearly the only intent of the State in producing such evidence in such vivid detail was to predjudice the Appellant, which it clearly did. That predjudice is obvious not only from the jury verdict but from this Court's opinion.

The Court on four pages makes a great detailed study of the henious acts of which Appellant had been accused both in this case and the charge on which he was jailed at the time of Everett's death. The Court's opinion states, that he was in jail to "await disposition of charges of kidnapping, raping, and sodimi ing two nine year old girls'. The wording of the opinion shows the abhorance which the Court feels toward those types of acts. Clearly this Court had difficulty divorcing the legal issues from the shocking nature of the charges leveled at the Appellant. A jury in rural Missouri cannot be expected to greater ability than trained legal minds to do so. As the above facts were overlooked in the opinion, rehearing is warranted.

3. The Court overlooked material facts in its holding in Point IV allowing the State to argue the range of punishment contrai to Section 565.006 RSmo., 1978. The Court held since the Defendant' attorney stated he would mention punishment in his closing argument it was permissable for the State to do so.

The fact is, however, that the defense did not mention the ran; in the presence of the jury and could not have been held to have waived the statutory prohibition against its consideration.

The Court's opinion overlooked the fact the prosecutor mentione the ranges of punishment in the opening half of his closing argumen and not the rebuttal (T 809). If the defense was going to open the door, by mentioning punishment, any such comments by the prosecutor should have been postponed until such time as the defense did so.

As the prosecutor does have the opportunity to rebut any statements made by the defense in its closing argument, the prohibition of the statute was violated.

Whether or not the prosecutor "argued" punishment or merely stated the range, the statute was violated in that range of punishment was placed before the jury for its consideration in its deliberation as to guilt innocence. It was the fact that the jury was informed of the range and not the words with which the prosecutor did so which violate the statute and thus Court's opinion should be reconsidered.

4. In deciding Point V, the Court misinterprets a material fact concerning the sufficiency of the State's Notice of Evidence of Aggravating Circumstances. As pointed out in the Court's opinion, that Notice was not received by Appellant until June 23, 1980, a month before trial.

It is not until the Notice in Aggravation is received that the Defendant is put on Notice that the State, in fact, intends to seek the death penalty. The intention on the part of the State could change not only the strategy of the defense in the punishment phase but also in the trial itself. One months time would be insufficient to present an adequate defense to the request for a sentence of death even had the State indicated the evidence it would present. To allow the State to present evidence of Aggravating Circumstances or argue it to the jury without the particular facts on which the State intends to rely deprives the Defendant of Due Process as he is at a great disadvantage in answering them.

If., for example, the State intends to argue deterrence, the Defendant would well be advised to present evidence that capital punishment does not deter crime, but rather enhances it. There are experts in the St. Louis area who have testified at other capital murder trials in some of which the jury has rejected the death penalty. They would have been available for presentation had the Defendant, herein been adequately advised of the State's intentions concerning aggravation. To require appointed Defense Counsel on one month's notice to prepare that type of presentation, while at the same time attempting to prepare a defense to the charges themselves

is not reasonable and would deprive Defendant of adequate counsel and Due Process. Thus the opinion of this Court below, misinterprets those facts, and should be reheard.

5. The Court's opinion overlooks a material fact in affirming the decision on Point VI in that the officers who had testified to Defendant's reputation for truth and veracity were required to give no foundation for their familarity with Appellant's community reputation. This is in direct conflict with the case cited by this Court in its opinion that a witness is not allowed to give mere opinion of the accused's character.

All of the witnesses in this case attempted over defense objections to offer their personal opinion that Appellant was a chronic liar and there was no evidence produced that any of those witnesses knew anyone who was familar with Defendant or his reputation and had any knowledge of the general community opinion. Without the proper foundation as to the witnesses familarity with the reputation, the testimony becomes mere opinion and the holding of this Court otherwise erroneously applies the law to the facts herein.

Conclusion

For the foregoing reasons, it is respectfully submitted that this Court should Re-Hear the matter and reconsider its opinion previously entered.

Respectfull submitted,

Cynthia S. Holmes

CYNTHIA S. HOLMES #23033
Attorney for Appellant
915 Olive, Suite 1002
St. Louis, MO 63101

STATE OF MISSOURI)
)SS.
CITY OF ST. LOUIS)

Cynthia S. Holmes, being duly sworn and on her oath states that the foregoing Motion for Re-Hearing was served by United States Mail, postage fully pre-paid this 10 day of September, 1982 on the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102, Attorney for Respondent.

Cynthia S. Holmes

Subscribed and sworn to before me this 10 day of September, 1982.

[illegible]

My Commission Expires:
Dec. 14, 1985

No. 62523

Circuit Court No. CR-180-4FX

In the Supreme Court of Missouri

September Session, 19 82

State of Missouri, Respondent,

vs.

Patrick E. Trimble, Appellant.

Now at this day, the Court has entered the following orders in the above entitled cause:

"Appellant's motion for rehearing overruled."

"Appellant's motion for stay of execution overruled. Execution date re-set for October 28, 1982."

STATE OF MISSOURI—Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September *Session thereof, 19* 82 *, and on the* 7th *day of* October *19* 82 *, in the above entitled cause.*

Given under my hand and seal of said Court, at the City of Jefferson, this 7th *day of* October *19* 82

Thomas F. Simon *Clerk.*

Mary Elizabeth McHaney *D. C.*

Chapter 565

OFFENSES AGAINST THE PERSON

Sec.

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565.006. Verdict as to guilt when rendered—finding of guilt, effe of—presentence hearing, admissible evidence—penalt when imposed—reversible error, effect of.
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565.001. Capital murder defined

Any person who unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder.

L.1977, p. —, H.B.No.90, § A (§ 1), eff. May 26, 1977.

565.003. First degree murder defined

Any person who unlawfully kills another human being without a premeditated intent to cause the death of a particular individual is guilty of the offense of first degree murder if the killing was committed in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary, or kidnapping.

L.1977, p. —, H.B.No.90, § A (§ 2), eff. May 26, 1977.

565.006. Verdict as to guilt when rendered—finding of guilt, effect of—presentence hearing, admissible evidence—penalty, when imposed—reversible error, effect of

1. At the conclusion of all trials upon an indictment or information for capital murder heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment, and by their verdict ascertain whether the defendant is guilty of capital murder, murder in the first degree, murder in the second degree, manslaughter, or is not guilty of any offense. In nonjury capital murder cases, the court shall likewise first consider a finding of guilty or not guilty without any consideration of punishment, and by its verdict ascertain, whether the defendant is guilty of capital murder, murder in the first degree, murder in the second degree, manslaughter, or is not guilty of any offense.

2. Where the jury or judge returns a verdict or finding of guilty as provided in subsection 1 of this section, the court shall resume the trial and conduct a presentence hearing before the jury or judge at which time the only issue shall be the determination of the punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas. Only such evidence in aggravation as the prosecution has made known to the defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. In capital murder cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in section 565.012 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; except that the judge shall in

no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment.

3. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

L.1977, p. —, H.B.No.90, § A (§ 3), eff. May 26, 1977.

565.008. Death penalty, when imposed—life imprisonment, when imposed—minimum of fifty years to be served, when—first and second degree murder, penalties for

1. Persons convicted of the offense of capital murder shall, if the judge or jury so recommends after complying with the provisions of sections 565.006 and 565.012, be punished by death. If the judge or jury does not recommend the imposition of the death penalty on a finding of guilty of capital murder, the convicted person shall be punished by imprisonment by the division of corrections during his natural life and shall not be eligible for probation or parole until he has served a minimum of fifty years of his sentence.

2. Persons convicted of murder in the first degree shall be punished by imprisonment by the division of corrections during their natural lives. Persons convicted of murder in the second degree shall be punished by imprisonment by the division of corrections for a term of not less than ten years.

L.1977, p. —, H.B.No.90, § A (§ 4), eff. May 26, 1977.

565.012. Evidence to be considered in assessing punishment in capital murder cases

1. In all cases of capital murder for which the death penalty is authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider:

(1) Any of the statutory aggravating circumstances enumerated in subsection 2 which may be supported by the evidence,

(2) Any of the statutory mitigating circumstances enumerated in subsection 3 which may be supported by the evidence,

(3) Any mitigating or aggravating circumstances otherwise authorized by law, and

(4) Whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death or whether a sufficient mitigating circumstance or circumstances exist

which outweigh the aggravating circumstance or circumstances found to exist.

2. Statutory aggravating circumstances shall be limited to the following:

(1) The offense was committed by a person with a prior record of conviction for capital murder, or the offense was committed by a person who has a substantial history of serious assaultive criminal convictions;

(2) The offense was committed while the offender was engaged in the commission of another capital murder;

(3) The offender by his act of capital murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of capital murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The capital murder was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, elected official or former elected official during or because of the exercise of his official duty;

(6) The offender caused or directed another to commit capital murder or committed capital murder as an agent or employee of another person;

(7) The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;

(8) The capital murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duty;

(9) The capital murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;

(10) The capital murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

3. Statutory mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(7) The age of the defendant at the time of the crime.

4. The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt.

5. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed.

L.1977, p. —, H.B.No.90, § A (§ 5), eff. May 26, 1977.

565.014. Supreme court to review all death sentences, notice, contents of—findings required—assistant to supreme court authorized, duties of

1. Whenever the death penalty is imposed in any case, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the supreme court of Missouri. The circuit clerk of the court trying the case, within ten days after receiving the transcript, shall transmit the entire record and transcript to the supreme court together with a notice prepared by the circuit clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report by the judge shall be in the form of a standard questionnaire prepared and supplied by the supreme court of Missouri.

Supreme Court, U.S.
FILED
JAN 5 1983
ALEXANDER L. STEVAS
CLERK

No. 82-5861

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

PATRICK E. TRIMBLE,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF MISSOURI

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

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Attorneys for Respondent

QUESTIONS PRESENTED

1. Whether the imposition of the death sentence upon petitioner constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution because of surplusage in the punishment verdict of the jury.

2. Whether petitioner may raise constitutional claims in this Court which were never presented to the Supreme Court of Missouri or any other state court.

3. Whether the imposition of the death sentence upon petitioner constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments because evidence was admitted at trial that petitioner was charged with other crimes at the time of the murder, where this evidence was directly relevant to establish petitioner's motive and homicidal intent.

4. Whether the imposition of the death sentence upon petitioner constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments because the notice of aggravating circumstances did not specifically list the state's evidence relating to those aggravating circumstances, where this evidence was nevertheless disclosed to petitioner through regular discovery procedures.

5. Whether the imposition of the death sentence upon petitioner constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments because the prosecution referred to the possible range of punishment during the closing argument at the guilt stage, which reference was invited and solicited by the statements of defense counsel.

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OPINION BELOW

The opinion of the Supreme Court of Missouri, affirming petitioner's conviction of capital murder and sentence of death, is reported as State v. Trimble, 638 S.W.2d 726 (Mo. banc 1982).

STATEMENT OF THE CASE

Petitioner Patrick Edward Trimble was convicted of capital murder, §656.001, RSMo 1978, and was sentenced to death for the murder of Jerry James Everett, a fellow inmate of petitioner's in the St. Charles County Jail. The details of this crime, and the facts relating to petitioner's particular claims in this petition, are set out in the opinion of the Missouri Supreme Court, State v. Trimble, 638 S.W.2d 726 (Mo. banc 1982), and will not be restated here.

Of the five claims presently advanced by petitioner, four (claims 1, 3, 4 and 5) were raised by him at some stage of the state proceeding. The fifth (claim 2) has never been presented to any Missouri court.

ARGUMENT

1. The Jury's Punishment Verdict

In the first of his five allegations of constitutional error, petitioner asserts that the verdict of the jury imposing a sentence of death upon him was constitutionally invalid because (according to petitioner) the jury considered

and found an "aggravating circumstance" not submitted by instruction or authorized by law.

The absurdity of this characterization is apparent from the facts. At the punishment phase of trial, the jury was instructed upon two possible aggravating circumstances: that petitioner was in lawful custody at the time he committed the murder, § 565.012.2(9), RSMo 1978; and that petitioner murdered the victim for the purpose of avoiding a lawful arrest, § 565.012.2(10). See State v. Trimble, 638 S.W.2d 726, 731 (Mo. banc 1982). In the course of its deliberation, the jury sent a question to the court asking whether it could simply put on the verdict form "'that at the time of the murder of Jerry Everett the defendant was in the lawful custody of a place of confinement,'" or whether it was required to go into "lengthy detail," as to its reasons for the death sentence. Id. at 731-732. The court replied, with the concurrence of appellant, that it could not answer their question. Id. Four minutes after this communication, the jury returned the following verdict:

> "We, the jury, having found the defendant Patrick E. Trimble guilty of the capital murder of Jerry James Everett, fix the defendant's punishment at death, and we designate the following aggravating circumstance or circumstances which we find beyond a reasonable doubt: that at the time of the murder of Jerry James Everett the defendant was in the lawful custody of a place of confinement and as a

deterrent to future acts of violents [sic]" (emphasis supplied).

As is readily evident from these facts, petitioner's description of the above-emphasized language as an aggravating circumstance" is fallacious. To the contrary, this is nothing more than an instance in which the jury, being uncertain as to the degree of specificity required in its verdict, set out one of the factors it considered in its deliberations in addition to specifying the statutory aggravating circumstance it found. It is unclear whether the jury's intended deterrence of violence is directed at petitioner himself ("incapacitation"), to the community as a whole, or a combination of both. In any case, it is frivolous for petitioner to suggest that the jury is somehow forbidden from considering the possibility of deterrence as a factor in its decision. Deterrence (both of the offender and the community) is one of the major policies in support of capital punishment. Gregg v. Georgia, 428 U.S. 153, 183-186, 226 (1976). While the individualized consideration of each crime and defendant is essential in the capital sentencing process, Id. at 189, neither authority nor logic supports the proposition that the jury may not also consider the purposes behind capital punishment in deciding whether or not to impose it. Obviously, had the present jury indicated that it felt that the death penalty was not a deterrent and had consequently declined to impose it, petitioner would now be eminently silent. It has long been recognized that surplusage in a jury verdict does not invalidate that verdict.

United States v. Lee, 532 F.2d 911, 914 (3rd Cir. 1976), cert. denied, 429 U.S. 898 (1976); United States v. Howard, 507 F.2d 559, 563 (8th Cir. 1974). Such is the case here.

The case at bar is different from Barclay v. Florida, No 81-6908 (certiorari granted November 8, 1982); and Zant v. Stephens, No. 81-89 (certiorari granted October 5, 1981), both currently before this Court. In these cases, the issue is whether a death sentence based upon a finding of several aggravating circumstances is voided when some but not all of the aggravating circumstances are found invalid or unconstitutional; the theory of the petitioners therein is essentially that the invalid aggravating circumstances "taint" the verdict because the jury might have based its decision on facts or factors not properly before it.[1] In the present case, however, it is undisputably the fact that no extraneous evidence or submission of any kind were made to the jury - rather, the jury deliberated solely upon facts and circumstances legitimately before it. That being the case, it cannot reasonably be said that the jury's verdict as to punishment was violative of petitioner's constitutional rights.

2. Validity of Aggravating Circumstance

Petitioner next attacks the validity of the aggravating circumstance found in this case, that "[t]he capital murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement,"

---

[1]The fallacies of that rationale are addressed in the amicus curiae brief on behalf of thirteen states in Zant v. Stephens, supra.

§ 565.012.2(9), RSMo 1978. According to petitioner, "in cases such as this the death penalty violates the Eighth Amendment where it is imposed based solely on a person's status as an inmate" (petition at 15).

An initial major difficulty with this contention is that it has never been presented to the state courts but rather is advanced for the first time in this petition. As this Court has noted:

> "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system" (citations omitted). Webb v. Webb, 451 U.S. 493, 496-497 (1981).

See also Sandstrom v. Montana, 442 U.S. 510, 527 (1979). Petitioner's failure to raise his present challenge in the Missouri Supreme Court is evident (and may be presumed) from the fact that that court did not address the issue in its opinion. Street v. New York, 394 U.S. 576, 582 (1969). Accordingly, this theory is not properly reviewable here.

In any event, this aggravating circumstance is valid on its face and as applied. Section 565.012.2(9) is taken directly from the Georgia statute which was upheld by this Court in Gregg v. Georgia, supra, 428 U.S. at 196-198. Contrary to petitioner's assertion (petition at 15-16), its legitimate purpose is to present or punish murders by any

person in the lawful custody of the state; no constitutional distinction exists between murders by a convicted person and those who (like petitioner) has been charged with a crime but has not as yet been convicted of it. Finally, the application of this aggravating circumstance to petitioner not only does not render it "vague," it is uniquely appropriate to petitioner's crime. While in the St. Charles County Jail on charges of kidnapping, raping, sodomizing and sexually abusing two nine-year-old girls, and fully knowing that he was guilty of these crimes and that he would probably be convicted, petitioner decided to commit a murder so that he would have a more favorable status with his fellow prison inmates. State v. Trimble, supra, at 730. So saying, he tortured, sexually abused and murdered another prisoner at the jail. Id. at 730-731. In short, since petitioner himself undisputably committed the present murder solely on the basis of his status as a person in custody, it is absurd for petitioner to contend that the aggravating circumstance at issue is "vague" when it was applied to him for precisely that reason. Godfrey v. Georgia, 446 U.S. 420 (1980).

3. Evidence of Other Crimes.

Third, it is asserted that petitioner's due process rights were violated when the state was allowed to introduce evidence that he had been charged with rape and sodomy at the time of the murder.

As extensively set out in the opinion of the Missouri Supreme Court, State v. Trimble, supra at 730, 732-733, this evidence was directly and uniquely relevant to petitioner's motive in committing the murder and the degree of his criminal intent

in doing so. The same evidence would have been admissible under federal law, Rule 404(b), Rederal Rules of Evidence, and state evidentiary rules which are even more liberal in admitting evidence of prior convictions have been upheld by this Court. Spencer v. Texas, 385 U.S. 554, 559-569 (1967). No colorable constitutional issue is presented here.

4. Notice of Aggravating Circumstances

Under §565.006.2, RSMo 1978, as interpreted in State v. Trimble, supra, at 735, the state is required to give notice to the defendant prior to trial regarding any aggravating circumstance which may be submitted at the punishment phase of trial. Under the Missouri rule on discovery, the state is obligated to disclose the names of all potential witnesses and other information whereby the evidence supporting the aggravating circumstances may be determined. Id. Petitioner now asserts that §565.006.2 is unconstitutional because it does not require that all items of evidence relating to the aggravating circumstances be listed in the notice.

This assertion refutes itself. Unquestionably, the defendant is entitled to the disclosure of potential evidence in aggravation. Gardner v. Florida, 430 U.S. 349, 361 (1977). However, the disclosure of potential witnesses and evidence relating to crime and punishment is already provided for under Missouri law, and there is not the slightest evidence (or even an allegation) that full and proper disclosure was not made. Rather, petitioner simply feels that it would be more convenient for him if each and every item of evidence

potentially relevant to any aggravating circumstance was separately listed in the notice. As the Missouri Supreme Court observed, "[w]e decline the invitation to read useless requirements into the statute." State v. Trimble, supra, at 735. Equally, petitioner's attempt to insert a trivial and hypertechnical requirement into the notice statute presents no legitimate constitutional issue.

5. Reference to Range of Punishment at Guilt Stage

Finally, petitioner contends that his conviction violates the constitution because the prosecution made reference to the range of punishment for the crime charged and the lesser included offenses submitted during the closing argument of the guilt stage of trial. His assertion that this was "contrary to Section 565.006, RSMo" (petition at 19) is erroneous, since that statute merely provides that punishement is not at issue in the guilt stage, not that it may not be referred to.

It is difficult to perceive how petitioner may assert that his constitutional rights were violated when he invited the reference in question; prior to closing argument, defense counsel himself stated his intention to refer to the range of punishment. State v. Trimble, supra, at 734. In any event, petitioner cites no authority, and respondent is aware of none, which has ever held that a reference to the range of punishment at the guilt phase is prohibited by the United States Constitution. Given the fact that the prosecution is entitled to advise the jury panel during voir dire that one possible punishment for capital murder is death--the

punishment ultimately imposed upon petitioner in this case--such a claim would appear to be meritless on its face. Witherspoon v. Illinois, 391 U.S. 510 (1968).

CONCLUSION

In view of the foregoing, the respondent respectfully submits that petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

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